IN THE UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD REGION 13

	X
LATINO EXPRESS, INC.,	: : '
and	: 13-CA-46528
CAROL GARCIA, AN INDIVIDUAL,	
and	: 13-CA-46529
PEDRO SALGADO, AN INDIVIDUAL,	; ;
and	: 13-CA-46634
TEAMSTERS, LOCAL UNION NO. 777, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO	:The Honorable Michael A. Rosas :Administrative Law Judge :NLRB Regional Office :209 S. LaSalle Street :Chicago, IL 60604 : :ORAL ARGUMENT REQUESTED

LATINO EXPRESS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION

EXCEPTION # 1 FINDINGS OF FACT 1. GENERAL OPERATIONS

- (i) The ALJ found that Raymundo Del Toro, Jr. was a company supervisor based on his assignment of charter work. (ALJ Decision, p. 3, lines 39-40.)
- (ii, iii) Objection is taken with ALJ's conclusion as this was not an issue, and referring to him as a supervisor is contrary to the Parties' position. (Tr. 93, line 20-22.)
- (iv) The grounds for the exception are the ALJ's ruling that Del Toro, Jr. was a supervisor based on his assignments of charters that allowed the drivers and Del Toro, Jr. to steal money from the Company. As such was done in the conspiracy to defraud the Company, such was outside of the duties as a supervisor, if Del Toro, Jr., was a supervisor.

EXCEPTION # 2 FINDINGS OF FACT 2. CHARTER SERVICES

- (i) The ALJ failed to state that: (a) the Company Policy did not include paying drivers in cash for their wages; and (b) the role of the drivers, specifically, Pedro Salgado, in the theft.
- (ii, iii) Objection is taken with ALJ's summary of the Charter Services process. (ALJ Decision, p. 3-4.) Although the ALJ recognized that the Company was required to compensate charter drivers by check for their wages and that Salgado knew accepting cash was wrong (ALJ Decision, p. 3, line 18, 48-49), the ALJ Decision fails to identify the role of the drivers in the theft. Handing cash to drivers was outside the normal way of paying the driver. (Tr. 339, lines 11-14.) Del Toro, Jr. and the drivers utilized at least two methods in stealing the money from the Company. First, a fake invoice was created (Tr. 335-336; R. Ex. 14 C), as such it was not recorded. Then, if the customer paid for a charter with cash, the money was divided between Del Toro, Jr. and the driver. (Tr. 325-326.) If the customer paid with a check, Del Toro, Jr. would endorse the check, put the cash in his own checking account, and when it cleared, he would pay the driver. (Tr. 326:10-25; 327:1-10) (R. Ex. 5 A, 5 B, D 5, D 22, D 23, D 25, D 26, 6 A, 6 B, 12, 13, 14.) The drivers, one of whom was Pedro Salgado, participated in the theft. (Tr. 325, lines 16-2, 388-389.) That is why he was in the small group of drivers who were assigned charters, as opposed to the charters being assigned by seniority. (Tr. 651, lines 17-21.) Salgado admitted that he was paid by the Company only weekly. (Tr. 386, lines 24-25.)
- (iv) The grounds for the exception are the ALJ's omission of recognizing unrebutted testimony regarding the Company Policy and theft by Pedro Salgado, which was the basis of his termination for cause.

EXCEPTION #3 FINDINGS OF FACT 3. POLICIES

i) The ALJ Decision failed to recognize the General Counsel's stipulation that the Chicago Public School's ("CPS") three year contract was expiring at the end of the 2011 school year and would have to

be re-bid, that no cash can be accepted as part of a driver's wages, and that the reason why the drivers paid for accidents that were their fault was so that the accident would not hinder their driving record.

(ii-iii) Exception is taken with the ALJ's Decision as it ignores the Parties' stipulation and the unrebutted testimony. It was the General Counsel's position that the raises given out in January 2011 were an attempt to discourage unionizing. However, the CPS contracts were offered into evidence, and the General Counsel stipulated to the three year contract. (Tr. 755, lines 12-15.) The CPS contract ends at the end of the 2011 school year. (Tr. 635:15-20.) Logically then, as there are 28 other bus companies bidding for the Chicago Public Schools bus routes, before bidding on the contract, Gardunio needs to know how much he is going to have to pay his drivers. He gives raises every 2 ½ to 3 years based on the Chicago Public School systems three year contract for the bus service. (Tr. 644:16; 646:3.) Pedro Garcia stated that his last raise was three years ago. (Tr. 133:8-13.) Therefore, the ALJ Decision that states that it was unclear as to when the bidding would be done (ALJ Decision p. 4, lines 36-380) is ignoring the stipulation and testimony. The bidding would have to be completed before the three year contract was ended.

The ALJ Decision also describes Gardunio's testimony as "evasive" regarding drivers who receive cash from customers. (ALJ Decision p. 4, lines 39-42.) As the testimony showed, the drivers could receive payments for the charters by purchase order number, check, cash, or money order. (Tr. 324, line 7.) As such, it was not against the Company Policy for a driver to accept cash, but it was against Company Policy for a driver to accept cash for wages or to accept cash and not tell the Company. This was stealing. As such, this testimony was not "evasive".

The ALJ calls the Company Policy against threatening persons "inconsistent". (ALJ Decision, page 4, lines 45-49.) The evidence shows that when Gardunio was asked by an employee to step outside to fight, before 2010, he fired that person immediately (Tr. 607-608), and the next time he was threatened by an employee, Carol Garcia, when she stated that she was going to get him back for taking her money by making her pay for the damage that she caused, he did not fire her for two months. It is not understandable how this is inconsistent. The method in which a Company Policy was enforced years

earlier cannot be compared to its enforcement years later and ignores that issue that there is a Company Policy. (It is noted that the ALJ also refers to another matter, but that involved a "resident.")

The ALJ refers to the Company Policy of having the drivers pay for damage that was the drivers' fault. (ALJ Decision, p. 4, lines 17-21.) However, in an attempt to keep accidents off of the driver's records, the Company will pay for a portion, but the driver has to pay a portion of the damages. (Tr. 685, lines 24-25; 686, lines 1-2.)

(iv) The grounds for the exception are the ALJ's omission of recognizing unrebutted testimony that supports the Company's position that the raises were given in accordance with the Company's past policy of giving raises when the CPS contract was ending, that cash was accepted by the drivers, but not given to them as their wages, and the damages that were the result of the accidents that were the fault of the drivers were paid in part by the drivers to assist the drivers. Recognizing this evidence supports the Company's position that the raises were not an attempt to discourage Union organizing, Gardunio's testimony was not evasive, but answers to General Counsel's inarticulate questions that General Counsel demanded be answered with a "yes" or "no", the Company Policy against threatening persons is not applied inconsistently, and the request for drivers to pay a portion of accidents that they caused protects the drivers.

EXCEPTION # 4 FINDINGS OF FACT B. THE UNION ORGANIZING CAMPAIGN

- (i) The ALJ Decision, although it states what the employees were doing, ignores the unrebutted testimony that the only information that Sara Martinez gave Gardunio was that she saw some drivers at a restaurant that was located 1-1/2 blocks away from the premises.
- (ii, iii) Objection is taken with ALJ's summary of the Union Organizing Campaign as the ALJ Decision fails to recognize the testimony that no one in management knew about the campaign. The ALJ Decision does recognize that "there is no direct proof that Company managers or supervisors knew" about Garcia's and Salgado's solicitation of coworkers or obtaining signatures for union cards. (Tr. 56-60, 251-252, 254-255, 259-261, 354-357, 361; GC Exhs. 5,7.) (ALJ Decision, lines 36-39.) The evidence shows

inconsistency among the witnesses as to where everyone was standing at the time that Sara Martinez made an amazing amount of eye contact with all of them: It was dark outside, as it was late in the year, and Sara Martinez was "driving through". (Tr. 92, lines 8-9.) Pedro Garcia was standing by the door of the restaurant, and he and Sara Martinez stared at each other. (Tr. 92, lines 13-14.) Some of the other employees were still in the restaurant, and some had already left. (Tr. 92, lines 15-18.) Elizabeth Gonzalez testified that the bus was stopped at a stop light, and the employees were standing in a circle. (Tr. 72, lines 13-16, 25.) Carol Garcia testified that she was the first to come out of the restaurant, and Sara saw her and made eye contact with her. (Tr. 265, lines 10-16.) Pedro Salgado testified that he and four drivers exited the restaurant together, leaving the Union organizers inside the restaurant, when Sara Martinez made eye contact with him for four to five seconds. (Tr. 411, lines 4-5, 22-25, p. 412, lines 1-2, 12-13.) Frank Hernandez testified that Sara Martinez made eye contact with him while she was driving the bus, but stopped at a stoplight. (Tr. 448, lines 10-11.) The Union officers were already outside. (Tr. 448, lines 21-22.)

Although it is incredible that Sara Martinez made eye contact with so many individuals while driving a bus that was either stopped at a stop light or driving through, with the various persons either in the restaurant or outside or walking from the restaurant to the outside, there is absolutely no evidence that Sara Martinez said anything to anyone other than Gardunio, and she only informed him that she saw some employees at the restaurant. (Tr. 692, line 25; 693, lines 2-6; 19-24.)

(iv) The grounds for the exception are that the ALJ's Decision fails to underscore the absolute lack of evidence to support the ultimate conclusion of the ALJ. The ALJ's references fail to state that all Sara Martinez told Gardunio is that she saw some drivers at a restaurant. There is no evidence of any knowledge of a Union campaign based on this meeting.

EXCEPTION # 5 FINDINGS OF FACT C. DECEMBER 10

- (i) The ALJ relied solely on General Counsel's witness, Pedro Garcia, who admittedly did not understand what was being said. As such, Pedro Garcia's interpretation of what was said is not reliable, by his own admission.
- (ii, iii) Objection is taken with ALJ's reliance on a witness who admitted that his interpretation of what was being said may not be accurate. Pedro Garcia testified via an interpreter. (Tr. 85.) Pedro testified that he met with Gabino and Gabino stated that he found out that some of the drivers wanted a union and he wanted Garcia to think about it. (Tr. 97, lines 4-6.) Pedro Garcia then met later with Michael Rosas, Sr., who handed a piece of paper to Michael Rosas, Jr., who read it. (Tr. 99, lines 22-23.) Pedro Garcia did not understand it, so he asked another driver what he said. (Tr. 100, lines 1-2.) The Company's objection based on hearsay was overruled. (Tr. 100, 18-21.)
- (iv) The grounds for the exception are Pedro's conversations with Gabino were rank hearsay. Gabino was not on either Parties' witness list. To allow such hearsay was prejudicial to the Company. In addition, allowing Pedro Garcia to testify as to what another driver interpreted is hearsay and it should not have been allowed. Finally, to allow testimony by a witness who admits that he did not understand the conversation was prejudicial to the Company.

EXCEPTION # 6 FINDINGS OF FACT E. JANUARY 6 MEETING

(i) The ALJ referred to Pedro Salgado's comment in the January 6, 2011 meeting as raising the issue of the cash that they received for doing charters. This does not accurately describe Salgado's comments. (ii, iii) Objection is taken with ALJ Decision that summarily describes Salgado's comments as "rais[ing] the issue of the cash that they received for doing charters." (Tr. 107-109, 365-366, 416-419, 449-451, 479-481, 638-640, 653.) (ALJ Decision, page 8, lines 11-16; 43-45.) Pedro Salgado testified that he asked Gardunio why his office was paying drivers cash under the table. (Tr. 365, lines 5-7; 369, lines 1-10.) Gardunio appeared shocked and surprised and said they did not pay cash to drivers. (Tr. 366; 417.) Gardunio then asked Pedro Salgado more about this cash that drivers were being paid, and Salgado said that he knew that drivers were being paid cash. (Tr. 372.)

(iv) The grounds for the exception are the imprecise manner in which Pedro Salgado's testimony is summarized weakens the admitted knowledge by Salgado that drivers were receiving cash for their wages.

EXCEPTION # 7 and # 8 FINDINGS OF FACT F. JANUARY 7

- (i) The ALJ Decision stated that the ALJ found it incredible that the Company was still investigating the other drivers. (ALJ Decision, page 9, lines 6-12, line 39.)
- (ii, iii) Objection is taken with ALJ Decision that summarily dismisses the Company's attempts to determine its losses due to the drivers' theft. After the investigation was completed the drivers who were involved were all terminated. The ALJ Decision also states that Salgado was not given an opportunity to pay back the money that he received "for services rendered". (ALJ Decision, p. 9, lines 37-39.) Salgado denied that he stole any money, so Salgado could not be offered the opportunity to pay back the money. (Tr. 372, lines 17-19.)
- (iv) The grounds for the exception are the ALJ's presumption that investigating the widespread theft from the Company was an easy task that could have been resolved easily. The ALJ's Decision containing such commentary was unnecessary and ultimately, it is pointed out, untrue, as after the investigation, the drivers were terminated.

EXCEPTION # 9 LEGAL ANALYSIS A. 8(a)(1) VIOLATIONS

1. Impression Of Surveillance

(i) The ALJ Decision states that the Company created an impression of surveillance through comments made by Gabino to Pedro Garcia when Gabino stated he was aware of his union activity. (ALJ Decision, p. 11, line 19-20.) The ALJ Decision also stated that Gardunio's statement to Garcia and some other unidentified drivers that he knew something was going on, and would kick those drivers out once he found out, also created an impression of surveillance. (ALJ Decision, p. 11, line 23-25.)

(ii, iii) Objection is taken with ALJ Decision as there is no evidence that Pedro Garcia understood what Gabino said, and Pedro Garcia admitted that he did not understand a lot of what was said because it was spoken in English. (Tr. 113, lined 21-24.) Gabino only said that he knew they wanted to bring in a Union and they should be cautious. (Tr. 125, lines 8-11.) He never said not to Unionize. (Tr. 126, lines 2-5.) Pedro Garcia did not change his conduct because of any conversation that he had with Gabino. (Tr. 126-127; lines 23-5.) He does not remember anyone who he spoke with after his conversation with Gabino. (Tr. 128.)

The General Counsel carries the burden of proof under Section (a)(1) and Section 8(a) (3). In order to be entitled to protection under Section 8(a) (1) of the NLRA, employees must be engaged in "concerted activities" for the purpose of "mutual aid or protection." 29 U.S.C. Section 157.

An individual's actions will be considered "concerted" and therefore protected only if they are engaged in with or on the authority of other employees and the employer knows or has reason to know that this is the case. *Oakes Machine Corp.*, 288 N.L.R.B. 456, 128 L.R.R.M. (BNA) 1065 (1988), *aff'd in part, rev'd in part on other grounds*, 897 F.2d 84 (2d Cir. 1990). Employees who act strictly on their own are not protected even if they act out of concern for the group. *Meyers Industries, Inc.*, 281 N.L.R.B. 882, 123 L.R.R.M. (BNA) 1137 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C.Cir. 1987) (*Meyers III*).

An employee's otherwise legitimate protected protest over conditions of employment can lose its protections if it takes an unlawful or otherwise illegitimate form. Violence is an example of this rule. Employees cannot stay at work and refuse to obey a rule, as the employee's protest is then for harassment purposes rather than as a good-faith effort to change work conditions. *Ad Art, Inc.*, 238 N.L.R.B. 1124, 99 L.R.R.M. (BNA) 1626 (1978); *Media General Operations, Inc. y. NLRB*, 560 F.3d 181 (4th Cir. 2009) (employee who made attack against company vice-president forfeited protection of NLRA).

Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. §158(a)(3). To prove an employer's action unlawful

under this section, it is necessary to establish that it was motivated by an intent to discourage or encourage union membership. Thus, in these cases, unlike the §8(a)(1) cases, the anti-union motive of the employer becomes a necessary element of the case.

Only after this is established does the burden then shift to the employer to show that the same action would have taken place even in the absence of the protected activity. Wright Line, Division of Wright Line, Inc., 251 N.L.R.B. 1083, 105 L.R.R.M. (BNA) 1169 (1980). See also Rockford Tp. Highway Dept. v. State Labor Relations Bd., 153 Ill.App.3d 863, 506 N.E.2d 390 (Ill. App. 2 Dist.,1987) and Miller Electric Manufacturing Co. v. NLRB (7th Cir.1959), 265 F.2d 225, 227) ("[t]here must be a limit to the amount of strain the Board can place upon threadbare testimony. Here the evidence, when considered in its entirety as we are bound to do, clearly preponderates in favor of Buchberger's lawful discharge. He was subject to discharge for legal cause and the fact that he was engaged in union activity was a coincidence which did not render the just cause invalid").

Whether Section 8(a)(1) or 8(a)(3) is at issue, a decision based on an insubstantial foundation consisting of scant evidence, inference piled upon inference, and rank speculation is improper. *N.L.R.B.* v. Fontainebleau Hotel Corp., 300 F.2d 662 (C.A. 5 1962) ("when the foundation is recognized for what it is, it is apparent that the conclusion which rests upon it cannot stand). "Where the employer has proper cause for discharging an employee, the Board may not rely on scant evidence and repeated inferences to make a finding that places the Board in the position of substituting its own ideas of business management for those of the employer." *National Labor Relations Board v. Blue Bell*, 219 F.2d 796, 798 (C.A.5 1955).

There is no indication that Pedro Garcia understood anything that Gardunio said, as Gardunio speaks too fast for Pedro Garcia. (Tr. 106, lines 14-16.) There is no reference to the record that supports the conversation between Pedro Garcia and Gardunio. The ALJ Decision, worsened with the allowance of another driver's summary of conversation relayed to Pedro Garcia, is inference piled upon inference and is not competent evidence.

(iv) The grounds for the exception are the lack any type of support for surveillance based on Pedro Garcia's testimony. As such, this finding should be reversed.

EXCEPTION # 10 LEGAL ANALYSIS A. 8(a)(1) VIOLATIONS

2. Promising improved benefits and 5. Threat of Discharge

(i) The ALJ Decision states that, based on what Raminez, another driver, told Pedro Garcia what Rosas, Jr. said, indicated some violation, along with Gardunio's proposed increase in vacation time and increase in wage without a valid business justification. (ALJ Decision, p. 12, line 1-19.)

The ALJ Decision also states that Gardunio made statements that supported a threat of discharge. (ALJ Decision, p. 13, 38-44.)

(ii, iii) Objection is taken with ALJ Decision as a Pedro Garcia's co-employee's summary is hearsay. Furthermore, there was a valid justification for offering the wage increase, as so stated above. Specifically, it coincided with the end of the CPS three year contract.

Furthermore, to the contrary, there is no testimony that anything Gardunio said was a discharge threat. Gardunio never threatened to fire anyone for Union activity. (Tr. 316.) Salgado does not remember any threats from Gardunio, nor was he ever promised anything in regards to his Union activity. (Tr. 407.) Gardunio never made any threats or promises to the employees regarding unionization. (Tr. 675:15; 679:9.) There were no threats or no promises from management or the owners regarding benefits if they did not unionize. (Tr. 133:21-25; 134:1-3.)

(iv) The grounds for the exception are the lack any type of support. There was a valid reason provided. In the absence of support, and in fact, direct testimony to refute a promise to improve benefits in an attempt to defeat the organizing campaign, the Decision on the issue should be reversed.

EXCEPTION # 11 LEGAL ANALYSIS A. 8(a)(1) VIOLATIONS

2. Solicitation of Grievances

- (i) The ALJ Decision stated that the Company unlawfully sought to solicit grievances from its employees in the form of a committee when Gardunio suggested that they form a committee to address their problems. (ALJ Decision, p. 12, lines 39-40.)
- (ii, iii) Objection is taken with ALJ Decision as the unrebutted evidence shows that Frank Hernandez formed a group and that they wanted to talk with Gardunio; however, Gardunio declined to meet with them. (Tr. 670, lines14-25; 671, lines 1-23.)
- (iv) The grounds for the exception are that the evidence shows that before Gardunio knew about the Union activity, he said that they should get together and talk with him because he could not meet everyone one on one; however, after he found out about the Union efforts, Frank Hernandez approached Gardunio and Gardunio stated that it was too late. As such the ALJ's finding on this issue should be reversed.

EXCEPTION # 12 LEGAL ANALYSIS A. 8(a)(1) VIOLATIONS

2. Employee interrogation

- (i) The ALJ Decision stated that Gardunio approached a group of drivers in February 2011 and asked one of them what his position on the Union was. The ALJ stated that this coupled with Gardunio's statement to Frank Hernandez that they needed to talk about the Union situation established an unlawful interrogation of an employee. (ALJ Decision, p. 13, lines 9-17.)
- (ii, iii) Objection is taken with ALJ Decision as the evidence shows that although Gardunio approached a group, it was after he was invited to do so. (Tr. 672-673; 451-452.) Furthermore, there was no interrogation of any employee. The ALJ Decision relies on Salgado's testimony, which does not support a statement that there was an interrogation. (ALJ Decision, p. 9, lines 29-31; Tr. 367-368.) Most certainly Hernandez' testimony does not support such a finding either. (ALJ Decision, p. 9, lines 29-31; 451-452.)

(iv) The grounds for the exception are that the testimony absolutely fails to support the conclusion that there was an interrogation of an employee. As such the ALJ's finding on this issue should be reversed.

EXCEPTION # 13 LEGAL ANALYSIS A. 8(a)(1) VIOLATIONS

6. Prohibiting employees from speaking about the accident reimbursement policy

(i) The ALJ Decision states that by Gardunio informing Carol Garcia to not talk about the break that he was giving her on the money that she owed for backing up the bus into a car was an attempt to restrict

Garcia from discussing a concerted protected activity. (ALJ Decision, p. 14, lines 1-24.)

(ii, iii) Objection is taken with ALJ Decision as no such restriction took place. Both Gardunio and Carol

Garcia testified that Gardunio reduced the amount she owed and did not want Garcia to tell the other

drivers about the reduction because the other drivers would want a reduction also if they got into an

accident. (Tr. 241, lines 6-10; 690, 12-17.) There was absolutely no restriction or request that Garcia

refrain from discussing the accident policy. Furthermore, there was a concern voiced that due to the

extensive amount of damage done by Garcia, when Gardunio reduced the amount that she owed,

Gardunio did not want every driver who owed any amount expect to have the amount reduced, further

adding to the financial burden of the Company.

(iv) The grounds for the exception are that the ALJ's Decision on this matter does not have any

support in the record. There was no restriction imposed on Garcia and there was a valid concern voiced.

Both Garcia and Gardunio testified that the only thing that Gardunio asked that Garcia keep secret was

the reduction in the amount owed. There was absolutely no testimony that Gardunio requested that

Garcia not talk about a protected activity. As such, the ALJ's finding on this issue should be reversed.

EXCEPTION # 14 LEGAL ANALYSIS A. 8(a)(1) VIOLATIONS

7. Threat to close facility and 8. Statements of futility

- (i) The ALJ Decision states that Gabino made a statement that the Company would close and would never agree to union representation were violations as such were attempts at intimidation and futility, respectively. (ALJ Decision, p. 14, lines 37-40, 50-53.)
- (ii, iii) Objection is taken with ALJ Decision as there is no support in the record for these conclusions. First, according to Frank Hernandez, Gabino said that the Union would move the Company to another location, not the Company. (Tr. 457, lines 15-21.) According to Gabino, if *the Union* moved the Company, some of the drivers would lose their jobs. (Tr. 458, lines 6-9.) Similarly, there is no credible evidence that supports the ALJ's assertion that Gardunio told Carol Garcia that the Company would never agree to let the Union represent its employees. Carol Garcia did threaten Gardunio by telling him that she would get him back for terminating her. (ALJ Decision, p. 7, lines 40-41.)
- (iv) The grounds for the exception are the lack of evidence to support this. There is no evidence to support the ALJ's conclusion that Gabino said the Company would close. Likewise, there is no evidence that Gardunio told Carol Garcia that the Company would never agree to let the Union represent its employees. As such, the ALJ's finding on this issue should be reversed.

EXCEPTION # 15 LEGAL ANALYSIS B. 8(a)(3) VIOLATIONS 1. CAROL GARCIA

- (i) The ALJ Decision states that Carol Garcia engaged in a protected concerted activity, and that Gardunio was aware of that activity because Garcia told him and because she was leaving a union meeting in December when Sara Martinez saw them. (ALJ Decision, p. 15, lines 41-44.)
- (ii, iii) Objection is taken with ALJ Decision as there is no support in the record for these conclusions.

The General Counsel must prove certain elements to establish a *prima facie* case of discrimination. Those elements are (a) that the affected employee had engaged in activity protected by the Act, (b) the employer had knowledge of that activity, (c) the adverse personnel action imposed upon the employee was motivated by union animus, and (d) that the discipline had the effect of encouraging or

discouraging membership in a labor organization. The General Counsel has the burden of proving his case by a preponderance of the evidence. *Gonic Manufacturing Co., Div, of Hampshire Woolen Co.*, 141 NLRB 201, 209 (1963).

It is impossible for a discharge to be discriminatory without proof that the employer had knowledge of the employee's union activities, *Amyx Industries, Inc. v. NLRB*, 457 F.2d 904, 906 (8 Cir. 1972); *NLRB v. Ace Comb Co.*, 342 F.2d 841, 848 (C.A.Ark. 1965), and the Board always has the burden of proving such knowledge with substantial evidence. *NLRB v. Garner Tool & Die Mfg., Inc.* 493 F.2d 263 (C.A. 8 1974). Once this is established, the burden then shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Wright Line, Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, 105 L.R.R.M. (BNA) 1169 (1980).

Here, the General Counsel failed to shift the burden of proof to the Company. First, it must be remembered that Garcia fully threatened Gardunio verbally, which even the ALJ recognizes. (ALJ Decision, p. 7, lines 40-41.) Second, Garcia, who is an inch shorter than Gardunio but weighs 150 pounds more than Gardunio, then physically threatened Gardunio by standing up, pointing her finger in his face and stating that Gardunio was going to pay. (Tr. 687; 737, lines 2-5.)

Carol Garcia did not have any discussion about the Union with Henry Gardunio. (Tr. 679.) Garcia does not have any information that Gardunio knew about any Union activity. (Tr. 303, 308, 313.) Gardunio never threatened to fire anyone for Union activity. (Tr. 316.)

Carol Garcia was terminated for her physical and verbal threats to Gardunio. She testified that she would get back at him because Gardunio was following a policy that was in place. At the hearing, it was discovered that she solicited the help of other drivers to do something about it. Her involvement with the Union activity was very limited, Gardunio did not know about it, and there certainly is no evidence of threats or promises by the Company regarding the Union efforts.

(iv) The grounds for the exception are the lack of evidence to support this. There is no evidence to support the ALJ's conclusion that Carol Garcia was fired for any other reason than for her threats is pure

conjecture and speculation, and such cannot be a basis for finding discrimination. Carol Garcia has been angry since she was terminated and is simply carrying out her threat to get back at Gardunio. There is no credible testimony that supports her position. As such, the ALJ's finding on this issue should be reversed.

EXCEPTION # 16 LEGAL ANALYSIS B. 8(a)(3) VIOLATIONS 2. PEDRO SALGADO

- (i) The ALJ Decision states that Pedro Salgado was discharged for his protected concerted activity concerning his union organizing efforts and that this was disparate treatment because no one else was terminated by Salgado. (ALJ Decision, p. 16-17.)
- (ii, iii) Objection is taken with ALJ Decision as there is no support in the record for these conclusions.

Once again, as so cited above, the General Counsel has the burden of proof, and only when such has been proved does the burden shift the Company. In this case, the General Counsel failed to shift the burden.

First, the ALJ Decision avoids the very language that Salgado admitted that he used at the meeting. At the January meeting when they announced Raymundo Del Toro, Jr. was no longer the charter director, Pedro Salgado asked, "If Raymundo is not the charter director, what is going to happen to our cash charter money? I am owed \$500.00." (Tr. 639:1-5) Pedro Salgado testified that he asked Gardunio "why his office was paying drivers cash under the table." (Tr. 365, lines 5-7; 369, lines 1-10; 416, lines 11-12.) Gardunio appeared shocked and surprised and said they did not pay cash to drivers. (Tr. 366; 417.) Gardunio then asked Pedro Salgado more about this cash that drivers were being paid, and Salgado said that he knew that drivers were being paid cash. (Tr. 372.) Pedro Salgado also said, "I am owed \$500.00." Gardunio also heard people saying people are going to get fired and people are going to get in trouble; Pedro Salgado refused to answer anymore of Gardunio questions. (Tr. 639:17; 640:2; 653:25; 655:17.)

Del Toro, Jr. and the drivers utilized at least two methods in stealing the money from the Company. First, a fake invoice was created (Tr. 335-336; R. Ex. 14 C). Then, if the customer paid for a

charter with cash, the money was divided between Del Toro, Jr. and the driver. (Tr. 325-326.) If the customer paid with a check, Del Toro, Jr. would endorse the check, put the cash in his own checking account, and when it cleared, he would pay the driver. (Tr. 326:10-25; 327:1-10) (R. Ex. 5 A, 5 B, D 5, D 22, D 23, D 25, D 26, 6 A, 6 B, 12, 13, 14.) The drivers, one of whom was Pedro Salgado, participated in the theft. (Tr. 325, lines 16-2, 388-389.) That is why he was in the small group of drivers who were assigned charters, as opposed to the charters being assigned by seniority. (Tr. 651, lines 17-21.) Salgado admitted that he was paid by *the Company* only weekly. (Tr. 386, lines 24-25.)

He does not remember any threats from Gardunio, nor was he ever promised anything in regards to his Union activity. (Tr. 407.) The other drivers who participated in the theft were also terminated and have filed actions of their own.

(iv) The grounds for the exception are the lack of evidence to support the ALJ's Decision. Pedro Salgado took cash as wages for a charter. He demanded to know from Gardunio how he was going to be paid the \$500 that he was owed. Salgado admitted that when payment for a charter did not appear on his paycheck, he did not go to payroll, he went to the charter director, Del Toro, Jr. (Tr. 421- 422.) Del Toro, Jr. told him to be quiet, to come back in the afternoon. When Salgado returned, Del Toro, Jr. passed Salgado a \$100 bill, which Salgado took without saying anything until the company began investigating the cash for the charters. Salgado admitted that he did not think it was right to be offered money, but still did not say anything. (Tr. 388-389.)

Salgado's Union activities are practically nonexistent. In addition, there is no evidence that Gardunio or the company knew about his activity. There is direct testimony that there were no threats or promises made by the company.

As with Garcia, the Acting General Counsel failed to carry its burden in regards to Salgado. Even if such was done, the Respondent has sufficiently shown by a preponderance of the evidence that Salgado was terminated for stealing from the Respondent and for no other reason. Therefore, the ALJ's finding on this issue should be reversed.

EXCEPTION #17

CONCLUSION OF LAW, REMEDY, AND ORDER

Due to the above, the Conclusion, Remedy, and Order within the ALJ's Decision should be disregarded.

The evidence contained in the record demonstrates that Carol Garcia was terminated from her

employment for physically and verbally threatening Henry Gardunio, and Pedro Salgado was terminated

for stealing from the Respondent. The prima facie case was not made. That is, there is no evidence that

they had engaged in activity protected by the Act, that Respondent had knowledge of that activity, that

they were terminated due to motivation of union animus, or that the discipline had the effect of

encouraging or discouraging membership in a labor organization. Even if such prima facie case was

made, it was sufficiently rebutted. In addition, the allegations against the Respondent are absolutely

nonexistent and in fact contradicted by the employees' own testimony. There certainly is no legal

support to find in favor of the Acting General Counsel's position.

The ALJ's Decision does not accurately reflect the evidence presented.

As such, Latino Express, Inc. respectfully requests that there be a reversal of the ALJ's

Conclusion, that this Board enter a finding wholly in favor of the Company, an Order be entered

dismissing this matter in the Company's favor and against the Petitioners, and for any other relief deemed

appropriate.

ORAL ARGUMENT REQUESTED.

Respectfully submitted,

LATINO EXPRESS, INC.

BY One of Eatino Express, Inc.'s attorneys

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CERTIFICATE OF SERVICE

The undersigned, a nonattorney, hereby certifies that true and correct copies of the attached RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION, AND REQUEST FOR ORAL ARGUMENT, have, this 23rd day of August 2011, been served electronically upon the following:

National Labor Relations Board Washington, D.C.

Hon. Michael A. Rosas Administrative Law Judge National Labor Relations Board 1099 14th Street, NW Washington, DC 20570

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